Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States
October Term, 1994

ANGEL YUH WILLIAMSON, M.D.,
PENSACOLA DIAGNOSTIC & BREAST CLINIC, P.A.,

Petitioners,

v.

SACRED HEART HOSPITAL OF PENSACOLA,
BAPTIST HOSPITAL, INC.,
PENSACOLA RADIOLOGY CONSULTANTS, P.A.,
ALBERT A. POST, M.D. and
KEITH T. SHEARLOCK, M.D.,
HEALTH FIRST NETWORK, INC.,

Respondents.

Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI
Volume I

Steven L. Brannock
(Counsel of Record)
Elizabeth L. Bevington
Lora J. Smeltzly
HOLLAND & KNIGHT
Post Office Box 1288
Tampa, Florida 33601
(813) 227-8500

Attorneys for Petitioners

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 93-2756

ANGEL YUH WILLIAMSON, M.D.; PENSACOLA DIAGNOSTIC BREAST CLINIC, P.A.,

Plaintiffs-Appellants,

versus

SACRED HEART HOSPITAL OF PENSACOLA; BAPTIST HOSPITAL, INC.; PENSACOLA RADIOLOGY CONSULTANTS, P.A.; ALBERT A. POST, M.D.; KEITH T. SHEARLOCK, M.D.; HEALTH FIRST NETWORK, INC.,

Defendants-Appellees.

S. RANDALL HOBGOOD, M.D., ETC., ET AL.

Defendants.

On Appeal from the United States District Court for the Northern District of Florida

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ON PETITION FOR REHEARING

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 93-2756

ANGEL YUH WILLIAMSON, M.D.; PENSACOLA DIAGNOSTIC BREAST CLINIC, P.A.,

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SACRED HEART HOSPITAL OF PENSACOLA; BAPTIST HOSPITAL, INC.; PENSACOLA RADIOLOGY CONSULTANTS, P.A.; ALBERT A. POST, M.D.; KEITH T. SHEARLOCK, M.D.; HEALTH FIRST NETWORK, INC.,

Defendants-Appellees.

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Defendants.

On Appeal from the United States District Court for the Northern District of Florida

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ON PETITION FOR REHEARING

BEFORE: TJOFLAT, Chief Judge, DYER and HILL, Senior Circuit Judges.

PER CURIAM:

The petition for rehearing filed by appellants Angel Yuh Williamson and Pensacola Diagnostic & Breast Clinic, P.A.is

ENTERED FOR THE COURT:

_____

United States Circuit Judge

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-2756

D. C. Docket No. 89-30084-RV

ANGEL YUH WILLIAMSON, M.D.,
PENSACOLA DIAGNOSTIC & BREAST
CLINIC, P.A.,

Plaintiff-Appellant,

versus

SACRED HEART HOSPITAL OF PENSACOLA,
BAPTIST HOSPITAL, INC., PENSACOLA
RADIOLOGY CONSULTANTS, P.A., ALBERT
A. POST, M.D. and KEITH T. SHEARLOCK,
M.D., HEALTH FIRST NETWORK, INC.,

Defendants-Appellees,

S. RANDALL HOBGOOD, M.D., etc., et al.,

Defendants.

Appeal from the United States District Court
for the Northern District of Florida

(November 18, 1994)

Before TJOFLAT, Chief Judge, DYER and HILL, Senior Circuit
Judges.

EXHIBIT "1"

PER CURIAM:

This is an appeal from the entry of summary judgment in favor of the appellees. Review of the district court's grant of summary judgment is *de novo*; we must decide whether any genuine issues of material fact exist or whether the movants are entitled to judgment as a matter of law. *NAACP v. Hunt*, 891 F.2d 1555, 1559 (11th Cir. 1990) (citing *Shipes v. Hanover Inc. Co.*, 884 F.2d 1357, 1359 (11th Cir. 1989); Fed. R. Civ. P. 56 (c)). Having thoroughly reviewed the record, we agree with the conclusions reached by the district court and affirm on all counts.[1] We discuss each claim in turn.

I.

A.

This case was brought under sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26 (1988), and section 1 of the Sherman Act, 15 U.S.C. § 1 (1988). As an initial matter, we must decide whether the appellant, Dr. Williamson has standing to prosecute the antitrust claims in this case. *Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1448 (11th Cir. 1991). The district court did not explicitly address the standing issue, but it is clear from the record that Dr. Williamson does not have standing to assert her section 1 claims.

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[1] In addition to the summary judgment issues, Dr. Williamson appeals the district court's decision to strike certain expert witness affidavits she filed in opposition to the appellees' motion for summary judgment. We hold that the district court did not abuse its discretion in excluding the affidavits. *See Hancock v. Hobbs*, 967 F.2d 462, 468 (11th Cir. 1992).

Standing to sue under the Sherman and Clayton Acts is a question of law. *Austin v. Blue Cross & Blue Shield*, 903 F.2d 1385, 1387 (11th Cir. 1990) (citing *Midwest Communications, Inc. v. Minnesota Twins*, 779 F.2d 444, 449 (8th Cir. 1985), *cert. denied*, 476 U.S. 1163, 106 S.Ct. 2289, 90 L.Ed.2d 730 (1986)). A court must first determine if the plaintiff suffered "antitrust injury."[2] There must be a showing that the plaintiff's injury coincides with public detriment. Generally this requires either a showing of higher prices or lower output. The record does not indicate a reduction in the output of outpatient radiological services in the Pensacola market. Competition among hospitals, private radiology groups, and other health care providers ensures that various pricing and service options are available to the public. Because of its small market share, Health Options of Pensacola ("HOP") does not have the market power to exclude competition. To the contrary, additional radiologists have entered the market, and Dr. Williamson's own practice is thriving: Both appellant's corporate income and individual salary have risen dramatically since 1984 when she opened the Pensacola Diagnostic & Breast Clinic.[3] There is simply no evidence in the record that the general public has been harmed by appellant's inability to obtain

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[2] The Supreme Court has defined antitrust injury as "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977).

[3] The clinic's revenues have risen every year, growing from $187,881.00 in the fiscal year ending April 30, 1985, to $670,996.27 for the first eleven months ending April 30, 1990. During the same period, the appellant's salary package has increased from $45,139.00 to over $250,000.00.

membership in Health First Network ("Health First"), an independent practice association organized to service members of HOP. Because there has been no harm to competition, there has been no antitrust injury, and consequently appellant lacks standing.

B.

Even if we were to afford Dr. Williamson standing to prosecute her antitrust claims, we would affirm the district court's grant of summary judgment. Dr. Williamson alleges a host of conspiracies. First, she contends that Sacred Heart Hospital ("Sacred Heart") conspired with Pensacola Radiology Consultants ("PRC"), Dr. Albert A. Post ("Post"), and others to prevent her from competing for radiology patients. Second, she alleges a similar conspiracy among Baptist Hospital ("Baptist"), Radiology Associates, and others to prevent her from competing for patients. Third, the heart of the complaint is the appellant's assertion that there was a "community wide" conspiracy among all of the appellees to prevent her from gaining membership to Health First, which effectively disqualified her from treating subscribers of HOP.

1.

There is no direct evidence that Sacred Heart, PRC, and Dr. Post conspired to prevent the appellant from competing for radiology patients. The appellant relies on circumstantial evidence of appellees' failure to accommodate her requests for staff privileges and Sacred Heart's alleged attempts to "blackball" her. The appellant does not challenge the exclusive contract between PRC and Sacred Heart. Since the exclusive contract is valid, it follows, as the district court concluded, that

the denial of Dr. Williamson's initial application for privileges in the Department of Radiology on the grounds that it violated the contract was legitimate.

The appellant assumes that her services would have been so valuable to both Sacred Heart and PRC that they should have been eager to form an alliance with her had they been acting in their economic self-interests. The appellant asserts that their actions were pretextual. These assumptions break down in light of the fact that Sacred Heart was developing its own women's center, the Ann Baroco Center (the "Center"), and under the exclusive contract PRC would gain the Center's business. The Center placed Sacred Heart into even more direct competition with the appellant. The appellant possessed a strong position in the market--granting her any type of privileges would mean that Sacred Heart was, in effect, supporting its main competitor. We find nothing in the antitrust laws mandating such assistance to a competitor. We agree with the district court's conclusion that, given this competitive environment, Sacred Heart had a procompetitive reason for denying the appellant's requests for privileges.[4]

In addition, we agree with the district court's conclusion that the appellant has failed to show the joint conduct necessary to demonstrate an antitrust violation. The Board of Directors of Sacred Heart has the final authority to grant privileges or waive bylaws requirements. None of PRC's physicians sat on

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[4] Appellant maintains that PRC and Sacred Heart should have tried to join forces with her. Her idea of merging the only two significant sources for outpatient mammography in the Pensacola area has its own anticompetitive implications. In addition, there is ample evidence of appellant's unsuccessful negotiations with PRC--they do not, however, amount to evidence of an antitrust conspiracy.

Sacred Heart's Board, and none of them played a role in drafting the credentialling criteria for the Department of Internal Medicine. Additionally, none of the PRC physicians sat on any of the committees that reviewed appellant's application, with the exception of Dr. Post who sat on the Executive Committee. Nevertheless, the ultimate credentialling decisions constituted unilateral actions taken by the Sacred Heart Board and do not support a theory of antitrust conspiracy.

Appellant alleges that her referral base was attacked through reciprocal agreements with other physicians and the use of pressure and threats to coerce those physicians into referring patients to Sacred Heart. Sacred Heart allegedly entered into agreements with physicians whereby it provided financial backing for their practices in exchange for referrals to Sacred Heart. The evidence regarding the "utilization" clauses is inconclusive. On the one hand, some of the doctors had no history of referrals to the appellant (e.g., Drs. Mixon and Howard). On the other hand, Dr. Antonelli said he always referred his patients to the appellant, and his agreement with Sacred Heart had no effect on his referral decisions. There is no evidence in the record, however, of Sacred Heart's leverage in the lending market--there is no evidence that Sacred Heart had some competitive advantage over other potential lending institutions or that its lending power was sufficient to restrain trade.

Appellant also alleges that Sacred Heart's banning of her needle placement patients constitutes circumstantial evidence of antitrust conspiracy. Appellant argues that her needle placement procedures involved no greater risk to the patient or to the specimen than did Sacred Heart's own procedures. Once again appellant's argument ignores the fact that Sacred Heart

was in direct competition with the appellant and nothing in the antitrust laws requires assisting a competitor. In addition, we agree with the district court's finding that there exists a compelling, procompetitive reason for banning appellant's procedure: She was outside the scope of Sacred Heart's quality controls. Without creating an inference of antitrust conspiracy, the decision of Sacred Heart was legitimate and reasonable given its potential liability for procedures outside its systems for evaluation and compliance.

There is no evidence in the record to support the appellant's allegation that her husband, Dr. Michael Williamson, was terminated by Pensacola Pathologists under pressure from Sacred Heart. Additionally, the only evidence in the record of PRC's and Post's attempts to intimidate physicians consists of a statement by Dr. Eugene Murphy. Murphy gave an interview to the FTC in which he said that Sacred Heart administrators tried to convince him to refer patients to Sacred Heart through an appeal to his loyalty to the hospital. Dr. Murphy apparently rebuffed these so-called threats. Post and PRC had no ability to adversely affect Murphy's practice, and there is no reason why they should be precluded from attempting to solicit business. This is the sole link between PRC, Post, and any alleged conspiracy. We, therefore, agree with the district court's conclusion that there is no genuine issue of material fact in the record concerning whether Sacred Heart, PRC, and Post conspired to violate section 1 of the Sherman Act.

As with the Sacred Heart conspiracy, there is no direct evidence that Baptist and Radiology Associates conspired to prevent the appellant from competing for patients. Baptist, however, eventually did grant the appellant the privileges she

sought. Appellant's complaint against Baptist is that Baptist failed to grant her all of the privileges she sought on the terms she demanded. Dr. Williamson claims that this failure to accommodate her is evidence of antitrust conspiracy. We, like the district court, disagree.

Within months of appellant's renewed application in February 1988, Baptist granted her full courtesy privileges under supervision--this satisfied her request for privileges that would allow her to provide follow-up care to the patients she saw at her clinic. At that time, Baptist explained that, given the interaction of the bylaws practice requirement and the valid exclusive contract with Radiology Associates, appellant would not be eligible for unsupervised privileges.[5] Appellant did not protest, and she signed a copy of the hospital bylaws. It was only after Health First denied her membership that appellant protested the level of her privileges. Even if we were to agree with appellant's assertion that Baptist's reliance on its bylaws was pretextual--that reliance would be unilateral action on the part of Baptist. There still would be insufficient evidence of a conspiracy between Baptist and Radiology Associates. Likewise, there is no evidence that Baptist attacked appellant's referral base. Indeed, the contracts between Baptist and various physicians made it clear that the loan in no way obligated the physician to refer patients to Baptist. There is no evidence that Baptist or Radiology Associates pressured doctors to divert referrals away from appellant. As with Sacred Heart, Baptist

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[5] Nothing in the record persuades us to doubt the legitimacy of either the hospital bylaws or the exclusive contract with Radiology Associates. The mere fact that the contract was reduced to written form around the same time the appellant applied for privileges is not evidence of an antitrust conspiracy. The hospital bylaws pre-date appellant's application, and there is no evidence that they had been changed.

and appellant are in direct competition for patients--therefore, Baptist would have a rational economic reason for denying appellant privileges. As we indicated above, Baptist has no legal obligation to assist or accommodate a competitor.

Appellant's theory is based on the assumption that the hospitals would realize a gain from their relationship with her because she must refer her patients to hospitals. The record indicates, however, that it is undisputed that she has never admitted a patient to any hospital at which she had privileges. Moreover, since obtaining privileges at Baptist she has visited only three patients there. We, therefore, agree with the district court that there is no issue of genuine fact concerning an alleged conspiracy between Baptist, Radiology Associates, and unnamed others.

Appellant alleges a "community wide" conspiracy among all of the appellees to prevent her from gaining membership in Health First, which limited her ability to compete for patients, in that she was effectively ineligible to treat HOP subscribers. Appellant maintains that the evidence of this conspiracy can be found in the parallel refusals of the appellees to accommodate her practice. To permit an inference of conspiracy, however, the appellant must establish that each defendant acted in a manner inconsistent with its economic self-interest. *Bolt v. Halifax Hosp. Medical Ctr.*, 891 F.2d 810, 826 (11th Cir.), *cert, denied*, 495 U.S. 924, 110 S.Ct. 1960, 109 L.Ed.2d 322 (1990) (citing *Pan-Islamic Trade Corp. v. Exxon Corp.*, 632 F.2d 539, 559 (5th Cir. 1980), *cert. denied*, 454 U.S. 927, 102 S.Ct. 427, 70 L.Ed.2d 236 (1981)). As our discussion above indicates, appellant has not done so--there are compelling economic justifications for the appellees' actions. Moreover, it is difficult to find parallel

action here, given that Baptist granted appellant the privileges she requested.

There is no evidence that the appellees conspired to keep appellant out of Health First. Other marketplace factors are at work here. HMOs by their nature are exclusive. The record indicates that Health First adopted its credentialling procedure to avoid costs--this was a legitimate business decision. Sacred Heart and Baptist have effective control over the membership of Health First. This was done, however, to compete with a local privately owned hospital and its HMO. Given that at its peak, HOP controlled only between 5% and 8% of the total group health insurance market, we do not believe that the anticompetitive effects of the HMO's practice outweigh its procompetitive benefits. Although appellant has been effectively excluded from HOP, she has been a member of many other provider programs. Given that at most 8% of potential patients are excluded from choosing appellant's services, the procompetitive benefits stemming from increased consumer choice outweigh the effects of the exclusive HMO organizational structure. We agree with the district court's conclusions that the appellees' denials of appellant's applications do not support an inference of antitrust conspiracy and that Health First's admissions requirements do not unreasonably restrain trade in the market. Accordingly, we affirm the district court's grant of summary judgment for all appellees as to Count III.

II.

Count IV of the complaint is a pendent state law claim of tortious interference with business relationships against appellees Sacred Heart, PRC, and Post. Under Florida law the

elements of the claim that must be proven are: (1) the existence of a business relationship under which the plaintiff has legal rights; (2) an intentional and unjustified interference with the relationship; and (3) damage to plaintiff caused by the interference. *Ad-Vantage Tel. Directory Consultants, Inc. v. GTE Directories Corp.*, 849 F.2d 1336, 1348-49 (11th Cir. 1987) (citing *G.M. Brod & Co., Inc. v. U.S. Itome Corp.*, 759 F.2d 1526, 1534 (11th Cir. 1985); *Ethyl Corp. v. Balter*, 386 So. 2d 1220, 1223 (Fla. 3d Dist. Ct. App. 1980), *cert. denied*, 452 U.S. 955, 101 S.Ct. 3099, 69 L.Ed.2d 965 (1981)); *see Tamiami Trail Tours, Inc. v. Cotton*, 463 So. 2d 1125, 1126 (Fla. 1985) (per curiam). The interference must be direct and the defendant must not have been acting to protect its own legitimate economic interests.

As is clear from the discussion above, we believe that Sacred Heart acted in its own economic self-interest. Its actions with regard to the needle placement controversy were consistent with its goals of maintaining control over hospital procedures--any effect on appellant's practice was incidental. Similarly, contracts between Sacred Heart and various physicians furthered legitimate business interests of both the hospital and the physicians; any effect on referrals to appellant was not caused by any action taken by Sacred Heart.

Again, the only evidence in support of appellant's claim against PRC and Post is that Post tried to encourage Dr. Murphy to refer patients to Sacred Heart's radiology department. This conduct--solicitation of potential customers--is not tortious. The doctors were engaged in competition for patients and did not use improper means. Moreover, there is no evidence that appellant was harmed--Murphy did not change his business practice; he continued to refer patients to appellant.

Having reviewed the record, we agree with the district court's conclusion that there are no genuine issues of material fact remaining in this case.

The judgment of the district court is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

ANGEL YUH WILLIAMSON, M.D., et al.,

Plaintiffs,

v. Case No. 89-30084-RV

SACRED HEART HOSPITAL OF PENSACOLA, et al.,

Defendants.

_____/

ORDER

Pending are motions for summary judgment filed by defendants Baptist Hospital ("Baptist") (doc. 291), Pensacola Radiology Consultants, P.A. ("PRC") and Albert A. Post, M.D. (Docs. 293-295), Health First Network, Inc. ("Health First") and Keith T. Shearlock, M.D. (doc. 296), and Sacred Heart Hospital of Pensacola ("Sacred Heart") (doc. 301). For the reasons stated below, the motion filed by PRC and Post is GRANTED as to Counts I, III, and IV. The remaining motions are DENIED.

I. FACTUAL BACKGROUND AND LEGAL STANDARD.

Plaintiff Angel Williamson, M.D., is a physician radiologist. Since its formation in May 1984, she has been the sole owner of plaintiff Pensacola Diagnostic Center Breast Clinic ("the Clinic"), which provides radiology and related medical services.[1] At the Clinic, plaintiff specializes in the diagnosis, care, and treatment of breast disease in women. She examines and treats patients and, if necessary, refers the patient to a surgeon.

This form of comprehensive breast care contrasts with the more traditional approach, in which the patient may need to separately consult a general practitioner, a radiologist, and a specialist. There is evidence suggesting that plaintiff's style of care differs from the traditional approach by virtue of an increased emphasis on extensive consultation with the patient before, during, and after the examination, and increased follow-up with consulting physicians. In providing these services, the Clinic competes with defendants Sacred Heart, Baptist, and PRC within the Pensacola, Florida area.

Plaintiff alleges that a large percentage of her potential patients are members of one of two health maintenance organizations ("HMOs"): Health Options of Pensacola ("HOP"), operated by Florida Blue Cross/Blue Shield; and Met Elect, operated by Metropolitan Life Insurance Company. Plaintiff is a member of Met Elect.

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[1] Since Dr. Williamson is the sole owner of the Clinic, the other plaintiff in this lawsuit, I refer to her as "the plaintiff" for the sake of brevity.

HOP is jointly and equally owned by: (1) Blue Cross/Blue Shield; (2) an affiliate of defendant Sacred Heart; (3) an affiliate of Baptist; and (4) defendant Health First, which functioned as the Independent Physicians Association ("IPA") for HOP. Its members exclusively provided physician services to HOP subscribers. Thus, to do business with patients who are HOP subscribers, plaintiff must be a member of Health First. Health First's membership rules required all independent radiologist to have staff privileges at an "affiliated" hospital --- in plaintiff's case, that meant either defendant Baptist or Sacred Heart.

Plaintiff has applied for, and been denied: (1) staff privileges at Sacred Heart in three departments; (2) full staff privileges at Baptist (as opposed to privileges "under supervision," which do not satisfy Health First's requirement); and (3) membership in Health First. Plaintiff argues that these denials were wrongful, supported by pretextual reasons, and effected in furtherance of an anticompetitive conspiracy.

According to plaintiff, the denials of membership and privileges were wrongfully accomplished through a number of means. Both hospitals had exclusive contracts with radiology practice groups for the provision of radiological services. Plaintiff maintains that these contracts were used as a pretext to deny plaintiff staff status, despite the fact that other radiologists who were not members of the respective practice groups had been granted staff status. Further, both hospitals allegedly adopted, amended, interpreted, and applied their bylaws in such a manner as to prevent an independent radiologist from gaining staff privileges. In addition, both hospitals applied economic pressure on area doctors to avoid referring patients to plaintiff. Finally, Sacred Heart applied economic pressure on Pensacola

Pathologists, a medical group that employed plaintiff's husband, to coerce plaintiff to scale back its aggressive competition with Sacred Heart.

Plaintiff asserts three claims under Section 1 of the Sherman Antitrust Act, Title 15, *United States Code*, Section 1. Count I charges defendants Sacred Heart, PRC, and Dr. Post only with Sherman Act violations. Count II is against Baptist only. Count III alleges a conspiracy among all of the defendants to injure plaintiff's ability to compete. Count IV asserts a pendent Florida law cause of action for tortious interference with plaintiff's business.

A motion for summary judgment should be granted when "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), Fed.R. Civ.P. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986); *Everett v. Napper*, 833 F.2d 1507, 1510 (11th Cir. 1987). An issue of fact is "material" if it might affect the outcome of the case under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986). It is "genuine" if the record taken as a whole could lead a rational trier of fact to find for the non-moving party. *See Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L.Ed.2d 538 (1986).

"The moving party is entitled to judgment as a matter of law if the nonmoving party cannot sufficiently show an essential element of the case to which the nonmoving party has the burden of proof." *Cornelius v. Town of Highland Lake*, 880

F.2d 348, 351 (11th Cir. 1989), *cert. denied sub nom., Spears v. Cornelius,* ___ U.S ___, 110 S.Ct. 1784, 108 L.Ed.2d 785 (1990). However, summary judgment is improper "[i]f a reasonable fact finder could draw more than one inference from the facts, and that inference creates a genuine issue of material fact." *Id.*

On a summary judgment motion, the record and all inferences that can be drawn from it, must be viewed in the light most favorable to the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S. Ct. 993, 8 L.Ed.2d 176 (1962). Furthermore, the court must consider the entire record in the case, not just those pieces of evidence which have been singled out for attention by the parties. *See Clinkscales v. Chevron USA, Inc.*, 831 F.2d 1565, 1570 (11th Cir. 1987).

II. DISCUSSION.

The parties are in general agreement on the elements to be proved on the antitrust claims. Plaintiff must show that the defendants have entered into a contract, combination, or conspiracy, and that the result of this conspiracy is an unreasonable restraint of trade. *NCAA v. Board of Regents*, 468 U.S. 85, 98-99, 104 S.Ct. 2948, ____, 82 L.Ed.2d 70, 81-82 (1984). To carry this burden, plaintiff may rely on either direct or circumstantial evidence; in most cases, however, plaintiffs rely on the latter. *Bolt v. Halifax Hospital Medical Center*, 891 F.2d 810, 819 (11th Cir. 1990).

When relying on circumstantial evidence to prove a conspiracy, a plaintiff must first show a non-legitimate motive for entering into such a conspiracy - - - that it would inure to the defendant's economic benefit. *Id.* Next, the plaintiff must

adduce evidence "that tends to exclude the possibility that the alleged co-conspirators acted independently and in a manner consistent with rational business objectives." *Id.* Although the plaintiff must ultimately show a "conscious commitment" on the part of the conspirators to enter a scheme designed to achieve an objective that is unlawful, the plaintiff need not show a specific intent to restrain trade or to build a monopoly; if the conspiracy has an anticompetitive effect, that may be sufficient. *Id.* at 819-820. The plaintiff must show, in addition to motive: (1) an intent to adhere to an agreement, which is (2) designed to achieve an unlawful objective. *Id.*

In *Bolt*, the Eleventh Circuit held that hospitals and doctors have a "rational economic motive" sufficient for antitrust purposes if they deny or revoke a physicians' privileges. *Id.* at 820. The court held, apparently on the basis of a law review article and a simplified application of supply and demand, that excluding a physician from practice in a hospital allows the remaining doctors to charge a higher price. *Id.* Therefore, in this Circuit, denial or revocation of medical privileges is always presumptively economically motivated. Thus, the test turns only on the second prong.

To determine the reasonableness of a restraint of trade, courts either declare the restraint illegal *per se* or analyze the claim under the "rule of reason." Under the latter approach, a restraint is unreasonable if it has an adverse effect on competition and cannot be justified as a procompetitive measure. *Seagood Trading Corp. v. Jerrico, Inc.*, 924 F.2d 1555, 1567 (11th Cir. 1991). The presumption in Section 1 cases is that the rule of reason standard applies. *Id.*

Per se illegality is the rule where the conduct involved "always or almost always tends to restrict competition and decrease output." *Id., citing Northwest Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 289-290, 105 S.Ct. 2613, 86 L.Ed.2d 202 (1985). Where a *per se* analysis is followed, the court need not conduct an elaborate analysis of market power and injury to competition. *Id.*

Plaintiff asserts that her antitrust claims fall under the *per se* approach, because her allegations, if proven, will establish a "group boycott" by the defendants. Horizontal group boycotts, or "concerted refusals to deal," are often subject to *per se* analysis. *See id.* at 1568, and authorities cited therein. In *Seagood Trading*, the Eleventh Circuit, interpreting Supreme Court and Eleventh Circuit authority, held that where two or more distinct entities agree to refuse to deal with a particular party, the arrangement is *per se* illegal. *Id.* The court distinguished those cases involving joint enterprises acting as a unit, or where the defendants share some other form of economic integration. *Id.* at 1567-1568, *citing Northwest Wholesale*, 472 U.S. at 295-297. The court also distinguished cases where one defendant refuses to deal with the plaintiff, and the other defendant instigated that refusal. *Id.* at 1568.

Nevertheless, for purposes of this analysis, I assume that a rule of reason analysis will be required. That does not mean that an elaborate inquiry into market definition or market power is necessary. In *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 106 S.Ct. 2009, 90 L.Ed.2d 445 (1986), the Supreme Court of the United States held that a "relevant market" inquiry is unnecessary where there is evidence of actual noncompetitive effects. In that Section 1 Sherman Act case, the

Court rejected an argument challenging a lack of findings regarding market definition and market power:

> Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, "proof of actual detrimental effects, such as a reduction of output" can obviate the need for an inquiry into market power, which is but a "surrogate for detrimental effects."
>
> *Id.* at 461, *citing* 7 P. Areeda, *Antitrust Law* ¶1511, p. 429 (1986).

Based on the record, I conclude that plaintiff has presented sufficient evidence of "actual detrimental effects" to render an elaborate market analysis unnecessary, at least at this stage of the case. She has also presented sufficient evidence to withstand summary judgment on the issues of injury to competition and actual injury suffered by her. Plaintiff presents the affidavit of another independent radiologist, Dr. Thomas Brown, who details the adverse effects his practice has suffered, allegedly because of the conduct of defendants. She also presents evidence tending to show that economic leverage used by defendants Baptist and Sacred Heart over numerous doctors have decreased referrals from those doctors. Further, by presenting evidence on the conspiracy generally, plaintiff has provided evidence that defendants have prevented plaintiff and Dr. Brown from competing with defendants for HOP patients. Finally, by offering evidence that her fees are substantially lower than those of her competitors (and would have been even lower if Health First had taken her up on her offer to discount

services in exchange for Health First membership), plaintiff has submitted evidence tending to show that defendants' actions have raised prices overall in the subject market. Summary judgment is not appropriate on the grounds of market definition, market power, injury to competition, or actual antitrust injury to plaintiff.

Finally, I conclude that the Health Care Quality Improvement Act, Title 42, *United States Code*, Sections 11101, *et seq.*, do not apply to bar plaintiff's claims. This statute creates antitrust immunity for a "professional review body" in connection with a "professional review action." 42 U.S.C. §11111(a). Defendants correctly point out that Sacred Heart, Baptist, and Health First qualify as "professional review bodies," and that their decisions regarding privileges and membership facially qualify as "professional review actions."[2] However, they also concede, as they must, that for immunity to attach, the review action must have been taken "in the reasonable belief that the action was in the furtherance of quality of care," and "in the reasonable belief that the action was warranted by the facts known after [a] reasonable effort to obtain the facts and after [providing] notice and hearing procedures." *Id.*, §11112(a). The statute creates a rebuttable presumption that these requirements have been met. *Id.*

As plaintiff points out, the entire thrust of her claims is that the defendants did not act in a reasonable belief that their actions furthered quality health care. As explained below, I

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[2] Not all of the actions alleged to have been taken by the defendants necessarily qualify as "professional review actions." For example, the alleged actions taken to divert referrals from plaintiff to defendants do not so qualify. Thus, even if the HCQIA acted to bar liability for the denial of privileges, antitrust liability could still exist with respect to non-qualifying actions.

conclude that sufficient evidence exists to create a genuine factual issue on this question. Thus, Section 11112(a)'s presumption has been effectively rebutted for the purposes of summary judgment.

Having set out the appropriate legal standards and resolved some preliminary summary judgment issues, I turn to the heart of the pending motions: whether the evidence in the present record may reasonably support an inference of an antitrust conspiracy.

III. EVIDENCE OF AN ANTITRUST CONSPIRACY.

Sufficient evidence exists to create a genuine issue of fact on whether the defendants conspired to injure plaintiff's practice. While most of this evidence, by necessity, is circumstantial, plaintiff does provide some arguably direct evidence of improper motive concerning Sacred Heart.

A. Direct Evidence.

1. **Retaliation Against Plaintiff.** In early 1984, plaintiff discussed her planned clinic for over three hours with Dr. Whitcomb, Sacred Heart's medical director. Plaintiff has testified at deposition that Whitcomb pressed her for details, and warned her, "If you open, we're going to close you one way or the other, we're going to blackball you." *See* Williamson dep., doc. 309, App. II-34 at 134, 368-269. Plaintiff, to whom English is a second language, testified that she remembered the word "blackball" distinctly because she had to go home and look it up in the dictionary.

2. **Retaliation Against Physicians Generally.** Sacred Heart's willingness to "blackball"

uncooperative physicians is supported by the testimony of Dr. Eugene Murphy, a doctor with 90% of his practice at Sacred Heart who gave a sworn statement before the Federal Trade Commission several months prior to his death.[3] Dr. Murphy testified that Sacred Heart was not happy that he used plaintiff's services. In several meetings with Murphy, Sacred Heart administrators, including Jay Hardman and defendant Dr. Post, tried to convince him to divert referrals to Sacred Heart. According to Murphy, the administrators focused on "loyalty" to the hospital, rather than on quality of care issues. Murphy refused, citing plaintiff's superior service and lower costs.

He stated that because he had an established practice that could be taken elsewhere, he had enough leverage to "resist that, the gentle armtwisting." Doc. 309, App. II-19 (Part 2), at 34. However, Murphy said, younger physicians with less established practices were more susceptible to such pressure, the methods of which he described in detail. Murphy stated that uncooperative physicians were subject to being "blackballed,"

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[3] Defendants object to Dr. Murphy's testimony on hearsay grounds. Plaintiffs respond that the testimony is admissible under Federal Rule of Evidence 803(24), entitled "Other Exceptions," which allows evidence having "circumstantial guarantees of trustworthiness," if it is material, more probative on the relevant point than any other evidence, and its admission will serve the interests of justice.

Preliminarily, Dr. Murphy's sworn testimony before the FTC may fall within Rule 803(24). *See, e.g., FTC v. Amy Travel*, 875 F.2d 564, 576 (7th Cir. 1989) (consumer statement to the FTC admissible over hearsay objection, even where there was no opportunity for cross-examination); *and Furtado v. Bishop*, 604 F.2d 80 (1st Cir. 1979) (affidavit of a deceased eminent attorney is admissible). However, even without this testimony, there is sufficient evidence to withstand summary judgment. Accordingly, I defer ruling on this objection until trial.

a process which could include a loss of referrals. *Id.* at 33-36, 48.

Plaintiff has testified that Drs. Stalnaker and Horan specifically warned her that their referrals to her would drop because of their new contracts with Sacred Heart. She further testified that Drs. Westafer and Irvin both declined to comment on the record on the subject of referrals because of fears of retaliation from Baptist and Sacred Heart.

3. **Retaliation Against Plaintiff's Husband.** Finally, plaintiff provides the testimony of herself and her husband, Dr. Michael Williamson ("Dr. Williamson"), that Sacred Heart successfully pressured his practice group, Pensacola Pathologists, to fire him. Dr. Williamson testified that at a Pensacola Pathologists meeting shortly after plaintiff began advertising her new clinic, Dr. Hilbert, founder of Pensacola Pathologists, told him that Sacred Heart was upset with the clinic's advertisements, and that this could mean trouble for the practice group, which meant trouble for him. At about the same period of time, Sister Mary Carroll of Sacred Heart began to question Dr. Hilbert about the quality of Dr. Williamson's work.

Plaintiff has testified that in a late 1985 meeting with Sacred Heart's Administrator, Jay Hardman, regarding her "needle placement procedure" patients (see below), Hardman asked her how she would feel if Pensacola Pathologists lost its

exclusive contract with Sacred Heart. This exchange is reflected in notes plaintiff made of the meeting.[4]

In 1988, the practice group's contract with Sacred Heart expired, litigation between plaintiff and Sacred Heart was imminent, and renewal of the contract was delayed. Dr. Stalnaker reportedly warned plaintiff that if she filed, her husband would be fired. During this time, Hardman's logs show frequent visits to Dr. McConnell of Pensacola Pathologists, even though neither one of them had primary responsibility for renegotiating the contract. On June 14, 1989, negotiations between Sacred Heart and Pensacola Pathologists were finally completed. On the same day, Drs. Howard and Hilbert informed Dr. Williamson that he would be fired. The next day, Sacred Heart signed the contract extension. On June 22, Pensacola Pathology's board formally voted to terminate Dr. Williamson. As a result, he lost his staff privileges at Sacred Heart.

B. Circumstantial Evidence: Sacred Heart.

1. **Denial of Privileges.** When Sacred Heart denied plaintiff's first application for staff privileges in the department of radiology, it explained that she was barred by Sacred Heart's exclusive contract with defendant PRC. However, PRC's head, Dr. Post, explained at deposition that the exclusive contract applied to the performance of imaging procedures such as x-rays and ultrasound. Plaintiff repeatedly made clear in her communications with Sacred Heart (and Baptist) that she did not

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[4]Plaintiff also attempts to relay on purported statements of Dr. Fenner McConnell, a Pensacola Pathologist member. These are hearsay and not admissible for purposes of this motion.

wish to perform such procedures at the hospital; rather, she merely wished to be able to "follow up" her outpatient clinic care at the hospital when her patient's treatment involved a hospital stay.[5] Dr. David Cross, one-time President of the Sacred Heart medical staff, thought this request made sense, and approached Sacred Heart Administrator Jay Hardman about accommodating plaintiff, which Hardman refused to do.

Plaintiff argues that such accommodation occurred in other cases. For example, she presents the affidavit of Dr. Thomas Brown, who affirms that for three years he enjoyed radiology privileges, even though he conducted an independent radiology practice and was not a member of PRC. His privileges were terminated only after he began to pick up Blue Cross/Blue Shield PPC patients. Sacred Heart admits this, but argues that Brown was not permitted to actually furnish radiological services at the Sacred Heart "or exercise any clinical privileges" at the hospital. Doc. 301, at 17. Plaintiffs provide another example of exceptions made to the exclusive radiology contract --- namely, perinatologists who performed OB-ultrasound at Sacred Heart. She also provides examples of exceptions made with respect to exclusive contracts in other departments, but most of these involved provisions for exceptions appearing in the contract language itself.

Barred from radiology privileges at Sacred Heart, plaintiff later applied for privileges in the departments of Internal Medicine or Family Practice. Plaintiff presents

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[5] This "follow-up care" included speaking with her patients in the hospital and, at the request of the admitting physician, doing physical histories, medical exams, providing medical advice, reviewing patients' charts, writing orders, and consulting with other physicians about the patients' breast care.

evidence that this was not an unreasonable proposal either, because Sacred Heart had previously granted Internal medicine privileges to "subspecialists" such as dermatologist, neurologists, and psychiatrists, all of whom were not general practitioners of internal medicine. She was prepared to present Sacred Heart with evidence that the comprehensive breast care she provided qualified as such a subspecialty.

Sacred Heart's bylaws provided for "Level I" privileges in these departments if the physician was qualified to "treat mild, uncomplicated illnesses ...". *Id.*, App. III, at 213. None of the defendants dispute that plaintiff was so qualified. A physician was also required to have completed one year of post-graduate clinical training in a "medically-oriented specialty." Plaintiff had a residency in nuclear medicine; she presents expert testimony that "nuclear medicine," a specialty recognized by the AMA since 1971, qualifies as a "medically-oriented specialty."

However, during the pendency of her application, the bylaws were amended to require a "primary care medically-oriented specialty." Significantly, plaintiff maintains that this amendment occurred through a violation of Sacred Heart's internal procedures for amending the bylaws. Relying on the deposition testimony of several Sacred Heart employees present at the relevant meetings, plaintiff asserts that certain amendments to the bylaws had gone up through the normal procedural channels without the "primary care" addition. Just before the final vote by the general staff on a new version of the bylaws, this language was added, in violation of the procedure for adopting amendments. Administrator Hardman could offer no explanation for this eleventh hour change, admitting that it was "highly unusual." *Id.*, App. II-13, at

160-161. The scope of the "primary care" requirement was limited: it was not added to the corresponding qualifications listed in the bylaws regarding the "subspecialties," such as dermatology, psychiatry, etc.

Given this change, plaintiff was no longer technically qualified for Internal Medicine or Family Practice privileges. The Sacred Heart credentials committee appealed to the radiology department to find a place for her, a request which was not fulfilled.

Two years later, plaintiff tried again, arguing that her nuclear and diagnostic residencies qualified her for privileges in some appropriate department so that she could provide general breast care without violating PRC's exclusive contract for on-site performance of imaging procedures. According to the affidavit of Dr. David Thomae, who was present at this credentials committee meeting, the committee members concluded that (1) plaintiff was qualified to treat "mild, uncomplicated illnesses," as required for Level I privileges; (2) the quality of care at the hospital would improve if plaintiff were granted privileges; and (3) granting her privileges would be in the overall best interests of the hospital. However, Sacred Heart informed the committee that its only task was to decide if plaintiff fit the criteria in the bylaws. In doing so, plaintiff argues, Sacred Heart willfully failed to inform the committee of its ability to waive bylaws requirements when circumstances required. Literally applying the criteria, the committee again denied plaintiff's request. Although the minutes of the committee do not reflect it, Thomae affirms that some members of the credentials committee requested the bylaws committee to find a place for plaintiff.

Plaintiff attempted to appeal this decision to the appropriate Sacred Heart administrative hearing body. Plaintiff attempted to present evidence on her own qualifications, the appropriateness of a waiver in her case, and the propriety of recognizing a subspecialty covering her field. She was precluded from presenting any evidence on the grounds that only the full hospital Board had the authority to grant such a waiver.

2. **"Attack" On Referral Base.** Plaintiff depends on referrals from other doctors for her business. Her main sources of referrals were Drs. Stalnaker, Murphy, Belk, Irvin, Mixon, and Howard. Citing evidence that Sacred Heart and PRC kept strict track of how many referrals each Sacred Heart-affiliated doctor made to Sacred Heart radiologists, plaintiff alleges that Sacred Heart entered into business arrangements with each of these doctors which furnished it leverage over those doctors, and that referrals from those doctors drastically dropped in the years immediately afterwards.

The figures are dramatic. Records show that in 1986, plaintiff received 800 new referrals from these doctors. By 1988, after the arrangements with Sacred Heart were entered into, that number had dropped to 155; by 1990, to 63. These reductions came at a time when referrals from other doctors not affiliated with any of the defendants were increasing.[6] None of the physicians involved cited concerns regarding the quality of plaintiff's care to explain the reductions; in fact, some of

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[6] Dr. Epps, who was without contractual ties to either hospital, testified that during the same period her referrals to plaintiff increased from 34 (in 1987) to 325 (in 1990).

them continued to refer relatives and close friends to plaintiff, while ordinary patients were being referred to Sacred Heart. Some of the physicians involved admitted that the contractual arrangements with Sacred Heart motivated the change in referral practice, while others denied any relationship between the two.

Many of the agreements in question explicitly refer to patient referrals. Sacred Heart loaned Drs. Horan and Turner $500,000 to buy the practice of Dr. Murphy and Dr. Stalnaker, the latter of whom went on to become the director of the OB/GYN residence program at Sacred Heart. The contract contained the condition that they use its outpatient facilities to the extent feasible unless patient choice dictated otherwise.[7] A similar arrangement was reached with Drs. Mixon and Howard, who contracted with Sacred Heart to operate a family care clinic. Howard's contract required him to use Sacred Heart doctors whenever practical to assure "continuity of care." Mixon's contract obligated him to use Sacred Heart's radiological services.[8] Significantly, the affidavit of Dr. Thomas Brown, the only other independent radiologist in Pensacola at the time, indicates that referrals to him ceased after these contractual arrangements were made. Brown's affidavit constitutes evidence on the harm caused to competition generally, and tends to rebut the defendants' legal argument that

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[7] Plaintiff has testified that Drs. Stalnaker and Horan specifically warned her that their referrals would drop because of their new contracts with Sacred Heart.

[8] At deposition, Dr. Turner, but not Dr. Horan, agreed that the contract required him to refer patients to Sacred Heart.

Drs. Belk and Irvin entered into a joint venture with Sacred Heart to operate a medical clinic. Their contracts did not mention referrals, but referrals did decrease dramatically afterwards.

no antitrust cause of action exists where only one competitor is injured.

One physician, Dr. Emilio A. Antonetti, testified at deposition that Sacred Heart insisted on a similar referral clause --- one requiring Sacred Heart referrals "to the extent feasible" and subject to patient choice --- in its loan agreement with him, but that he still sends substantial amounts of referrals to plaintiff, because he views her care as clearly superior. Antonetti also testified that Sacred Heart had originally proposed referral language even more restrictive than that eventually adopted, but he refused because he felt referrals should be based on quality of care concerns. According to deposition testimony, after a similar refusal by Dr. Fowler, Sacred Heart refused to renew the lease for the pharmacy he operated, forcing it to close down. Sacred Heart presents evidence that it closed down the pharmacy because of poor performance, but plaintiff counters with evidence showing that it was as profitable as at least one other pharmacy partially owned by Sacred Heart and not closed down.

Further, the record contains evidence regarding enforcement mechanisms for these requirements. Plaintiff presents the affidavit of Dr. Howard's nurse indicating that once the contract with Sacred Heart was established, Sacred Heart sent a "head nurse" to enforce the new referral policy. Dr. Howard's staff was instructed to refer all patients to Sacred Heart, without asking them where they wanted to go, unless they affirmatively objected.[9] The staff was also required to

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[9] It was precisely this sort of "channeling of patient choice" that the Eleventh Circuit found to constitute an antitrust injury to competition in *Key Enterprises of Delaware, Inc. v. Venice Hospital*, 919 F.2d 1550, 1554, 1559

keep statistics on all the clinic's referrals to hospitals, other physicians, laboratories, and diagnostic centers. These statistics would be presented monthly at Sacred Heart meetings.

3. The Needle Placement Procedure Controversy. Plaintiff alleges further retaliation by Sacred Heart regarding her "needle placement procedure."[10] Plaintiff presents deposition testimony from Sacred Heart doctors attesting that they had worked with plaintiff on the procedure on numerous occasions without any quality of care problems arising. Shortly after Sacred Heart denied plaintiff's first application for staff privileges, Administrator Jay Hardman began discussions that eventually led to the hospital's decision not to accept plaintiff's needle placement patients.[11]

(11th Cir. 1990).

[10] This procedure is apparently used when an examination reveals a small lesion in a patient's breast which must be removed for analysis. Often these lesions are too small to be found easily by the surgeon. Plaintiff inserts a "Kopan's needle," a medical device containing a thin hook-wire device. The needle is removed, leaving the hook-wire near the lesion to mark it. The patient is then walked from plaintiff's office across the parking lot to the Sacred Heart Surgicenter, where a surgeon would remove the lesion. While the patient remained in the Surgicenter, the specimen would be returned to plaintiff for dissection and another x-ray to ensure that the proper tissue had been removed. At that point the tissue would be sent to Sacred heart's pathology department for examination. In her opposition memorandum, plaintiff represents that the procedure employed by Sacred Heart radiologists differs only in that the specimen is returned to her clinic rather than to the hospital for the verifying x-ray.

[11] Hardman consulted with Dr. Bell of the pathology department and Dr. McMahon in the department of surgery. In addition, he consulted with defendant Dr. Post of the radiology department. In his deposition, Hardman denied having any reason to discuss the matter with Dr. Post, but another Sacred heart administrator, Dr. Lohmiller, confirmed that Dr. Post was involved. Plaintiff suggests Dr. Post's involvement illustrates that the decision was

Plaintiff presents expert testimony that the procedure was medically sound, and that the hospital's concerns were unfounded. In addition, plaintiff once again presents what she considers inconsistent applications of the stated concerns which prove their pretextual nature. For example, the hospital objected to the delay caused by patients having to walk from plaintiff's office to the Surgicenter. However, plaintiff's office is closer to the Surgicenter than the hospital's own radiology department. Sacred Heart also expressed concern that the specimen is outside its control when sent to plaintiff. However, Sacred Heart physicians and administrators conceded that the hospital uses numerous "outside" reference laboratories and sends specimens to them routinely. Finding no reason to distinguish these specimens from those sent to plaintiff, Dr. William Belk characterized this justification as "silly." Doc. 309, App. II-27 at 41-42. The rest of the justifications were consequences of plaintiff's lack of staff privileges. Plaintiff argues that these concerns, largely administrative in nature, would have evaporated had she been given the accommodation regarding staff privileges she felt she deserved.

B. Baptist.

1. Denial of Privileges.

Plaintiff had the same difficulties in obtaining privileges at Baptist, but ultimately she obtained more favorable results.[12]

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motivated by concerns regarding plaintiff's radiology competition rather than the medical concerns raised by Sacred Heart.

[12] Plaintiff alleges initially that Baptist delayed sending her an application. She first wrote for one in November 1984. The next month, Administrator John Robbins responded without enclosing an application, which

In late 1984, plaintiff wrote Baptist Administrator John Robbins to request radiology privileges, making clear that she did not seek to actually perform radiological services at Baptist. Robbins rejected plaintiff's request, citing its exclusive agreement with Radiology Associates regarding the performance of radiological services. Unlike Sacred Heart, Baptist did not have a written contract establishing the exclusive rights. However, Baptist's witnesses have testified that Baptist and Radiology Associates had proceeded on an oral understanding for the last several decades.[13]

As with Sacred Heart, plaintiff alleges that exceptions were made in other cases, but not in hers. Plaintiff cites the testimony of Dr. Bender, a member of Baptist's radiology staff, who indicated that Dr. McMahon, a non-member, performed pelvic and breast ultrasound at the hospital. In addition, plaintiff presents evidence that Baptist's cardiology group performed cardiac ultrasound until the late 1970s. Most importantly, plaintiff emphasizes testimony from Baptist's radiologists that they had no opposition to privileges for plaintiff, provided she did not use the hospital's radiology equipment. At an April 1985 meeting, the hospital's Executive

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she did not receive until May 13, 1985.

[13] Plaintiff disputes this, pointing to the testimony of Lynn Sheppard, Robbins' assistant, who testified that she was not aware of the exclusive agreement until plaintiff applied for privileges. Since Robbins admittedly relied on Sheppard regarding staff privileges matters, plaintiff argues, she would have been aware of any such agreement had it existed. In addition, plaintiff cites other exclusive contracts which had been reduced to writing, questioning why Baptist would choose not to do so in this case.

Committee denied plaintiff's request. The minutes of the meeting do not reflect that the radiologists' lack of opposition was considered.

Undeterred by her initial rebuff, the plaintiff obtained an application in May 1985. The next month, the hospital reduced the oral agreement with Radiology Associates to writing. This contract became the basis for Baptist's second denial of the plaintiff's application in June 1985.

Plaintiff waited until December 1987 to try again, seeking privileges in either radiology, internal medicine, or family practice. In January 1988, Baptist responded by re-explaining the exclusive radiology contract, and asking for an explanation of exactly what plaintiff proposed to do --- which, plaintiff maintains, she had already provided Baptist on the first two attempts to gain privileges. Plaintiff complied with Baptist's request. In August 1988 Baptist granted her "under supervision" privileges in radiology, on the condition that she withdraw her request for other privileges.

Plaintiff soon learned, however, that "under supervision" privileges were insufficient to qualify for membership in Health First, which required full privileges at an affiliated hospital. After plaintiff inquired about this criterion to Baptist, Baptist informed her that it had an "activity requirement" providing that the physician spend 30% of his/her time practicing in the Baptist radiological department over a 2-year period. Baptist explained that because of this requirement, plaintiff was not entitled to full privileges at the hospital.

2. "Attack" On Referrals. Plaintiff also presents evidence that Baptist entered into contracts with doctors, helping them equip and staff their offices, which affected those doctors' referrals to plaintiff. She provides the examples of Drs. French, Montgomery, and Westafer.[14] The figures show a reduction in referrals after the Baptist contracts,[15] but they are not indicative of any drastic drop, unlike the similar statistics for Sacred Heart. However, plaintiff alleges that plaintiff had not established strong referral sources among Baptist-affiliated doctors at the relevant time, and that Baptist's efforts inhibited increases in referrals during a period when, based on the referrals of non-affiliated doctors and the general growth of her practice, they should have been increasing.

C. Health First & Keith T. Shearlock, M.D..

Speaking for Health First, defendant Shearlock rejected plaintiff's 1985 application for membership because she did not have staff privileges at an HMO-member hospital (i.e., either Baptist or Sacred Heart). The rejection came five months after plaintiff submitted her application, which stressed her willingness to discount her prices for radiological services to levels lower than HOP currently paid.

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[14] Plaintiff has testified that Drs. Westafer and Irvin both declined to comment on the record on the subject of referrals because of fears of retaliation from Baptist and Sacred Heart.

[15] Plaintiff cites Dr. Westafer as an example, whose referrals to plaintiff fell from 70 in the year before his agreement with Baptist to 40 in the year afterwards.

Plaintiff submitted another application on June 5, 1987. Although she was scheduled to be reviewed by Health First's directors on June 16, defendant Shearlock reiterated his objection in a June 11 letter to plaintiff. He admitted at deposition that he did not have the authority to turn down plaintiff's application by himself; he explained his action by saying that he thought plaintiff's failure to meet the membership criteria regarding hospital privileges made her so obviously unqualified that it was unnecessary to take it to the full Health First Board.

At the June 16 meeting, Dr. Irvin urged plaintiff's acceptance, pointing to her offer to discount her services. The Board, however, rejected her application because of her lack of privileges at an HOP-participating hospital. The fact that plaintiff had privileges at Greenlawn and Abernathy, HOP-member hospitals located in the state of Alabama, did not change matters. Plaintiff again notes what she regards as exceptions made for others, listing 17 Health First members with staff privileges at either Greenlawn or Abernethy or other "outlying" hospitals, but not at Baptist or Sacred Heart. Shearlock explained that those doctors practiced in Alabama, not in Pensacola. Plaintiff, who practiced in Pensacola, had to have privileges at a member hospital in Pensacola --- either Baptist or Sacred Heart. Health First added this geographic requirement to its bylaws in 1985, shortly after plaintiff's first request for privileges at Sacred Heart. Plaintiff acknowledges the existence of the requirement, but (a) alleges it was added in an effort to exclude her, and (b) challenges it as an arbitrary provision.

Finally, in August 1988, plaintiff obtained radiology privileges "under supervision" at Baptist as described above.

Plaintiff's application for Health First membership was once again rejected, because Health First's bylaws required full privileges for membership. Once again, plaintiff provides evidence of exceptions to this requirement made for other physicians --- specifically, Dr. Springfield, who became a Health First member while in the process of obtaining board certification; and Dr. Epps, who became a Health First member even though she had privileges only "under supervision."[16]

D. PRC & Albert A. Post, M.D. The evidence against Pensacola Radiology Consultants, and defendant Post specifically, is somewhat less substantial than with respect to the other defendants. Essentially, plaintiff asserts that the radiology group, led by Post, took steps to cause Sacred Heart to deny plaintiff privileges as part of the overall anticompetitive conspiracy against her. There is evidence in the record that PRC opposed the granting of privileges to plaintiff, even after she made it clear that she did not wish to compete with them by actually performing radiological services at the hospital. PRC and Post argue that their opposition was rational in light of their exclusive contract with Sacred Heart, a contract which plaintiff does not, and cannot, challenge. *See Jefferson Parish Hospital No. 2 v. Hyde*, 466 U.S. 2, 104 S.Ct. 1551, 80 L.Ed.2d 2

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16 With respect to Dr. Epps, Health First rebuts with evidence that Epps fit under the exception for doctors who are "associated" with a qualified Health First member. But plaintiff denies that Epps was "associated" with the physician in question, pointing to deposition testimony in which Epps explains that she merely took emergency calls for the doctor when he was unavailable.

(1984) (exclusive contracts between hospitals and practice groups do not violate the antitrust laws).[17]

In addition, there is evidence that PRC kept computer records on the referrals made by Sacred Heart doctors. Finally, there is the testimony of Dr. Murphy, who stated that Dr. Post took part, along with Hardman and others, in the conversations in which Sacred Heart officials tried to pressure Murphy into diverting referrals from plaintiff to Sacred Heart radiologists.[18] This evidence does not relate to the privileges dispute, but it arguably supports an inference that PRC and Post were involved in the overall conspiracy.

Defendants PRC and Post cite *Todorov v. DCH Healthcare Authority*, 921 F.2d 1438 (11th Cir. 1991). In that case, plaintiff, a neurologist, brought antitrust claims against a hospital and a group of radiologists regarding the denial of the privilege to perform CT scan procedures. The Eleventh Circuit

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[17] The circumstances involving plaintiff's attempt to join PRC are similarly lacking in proof of conspiratorial intent. PRC offered plaintiff the opportunity to become an employee and eventually a stockholder of PRC, conditioned on plaintiff's abandonment of her comprehensive breast care practice, a condition plaintiff was unwilling to accept.

[18] In addition, plaintiff has testified that she was told by Carol Beem, secretary to Dr. Whitcomb, Sacred Heart's Medical Director, that Dr. Post and Dr. Whitcomb "got together and decided you don't need a privilege." This evidence is not admissible, nor given any weight, for three reasons. First, it is inadmissible hearsay. Second, Beem testified in her deposition that she had never talked with Dr. Post or anyone at the radiology group regarding Dr. Williamson's application. Third, the testimony of Beem, Whitcomb, and Post suggest that the statement, if ever uttered, was meant literally: that is, since plaintiff could visit patients at the hospital, view film, and consult with doctors without having formal privileges, such privileges were simply unnecessary.

upheld a grant of summary judgment for the defendants, on a number of grounds. Two grounds are relevant here.

First, the court held that proof that the radiologists recommended denial of the privileges, and that the hospital acted in accordance with this recommendation, is not by itself sufficient evidence of a conspiracy between the two. *Id.* at C139. However, the court also noted that there was no "additional evidence that reasonably suggests" conspiratorial conduct between the radiologists and the hospital. In this case, there is some, albeit slight, additional evidence: PRC's and Sacred Heart's practice of keeping track of referrals, and Murphy's testimony that Post participated in Sacred Heart's attempts to pressure him (and presumably other doctors) to divert referrals from plaintiff to Sacred Heart. To that extent, *Todorov* is distinct.[19]

The second relevant holding does apply to this case. The *Todorov* court also found that the plaintiff failed to make a showing that the radiologists caused the alleged injury. The court found that the hospital "unilaterally denied [plaintiff's] application for privileges; the radiologists, regardless of their desires, were not causally responsible for this decision." *Id.* at C139. This rationale applies squarely to defendants PRC and Post --- though not the other defendants, who had

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19 *Todorov* is also cited by the other defendants. The case is generally distinct. First, there was a substantial question regarding the plaintiff's medical competence to perform the requested procedures. Second, only one hospital (and a radiology group with no decision-making authority regarding privileges) was involved. Third, there was a complete absence of evidence suggesting that the hospital's asserted reason was a pretext. Fourth, the hospital had no rational economic motive for denying plaintiff privileges, other than the facially reasonable reason proffered.

decision-making authority with respect to membership or privileges. Based on *Todorov*, I must conclude that plaintiffs have not presented sufficient evidence of causation to survive summary judgment.

Count III, another count in which PRC and Post are named, alleges under Section 1 that the defendants have conspired to deny plaintiff and other independent radiologists membership in Health First. At her deposition, plaintiff admitted that she had no evidence connecting defendants Post and PRC with Health First's denial of membership status. Therefore, the causal connection here is even weaker than with respect to Count I. In fact, the only plausible means by which defendants Post and PRC could have accomplished this goal is through their asserted role in denying plaintiff Sacred Heart privileges (since privileges at either Baptist or Sacred Heart were necessary for Health First membership). Since I have determined that there is no genuine issue as to the absence of causation with respect to Count I, summary judgment for PRC and Post is also appropriate with respect to Count III.

I also find summary judgment appropriate for these defendants with respect to Count IV, the tortious interference count. Plaintiff alleges that PRC and Post intentionally and wrongfully interfered with her relationships, actual and prospective, with other doctors and patients. For the same "causation" reason articulated above with respect to the antitrust claims, this claim must fail. In *Buckner v. Lower Florida Keys Hospital*, 403 So.2d 1025 (Fla. 3d DCA 1981), for example, the court held that various individuals on the hospital staff and administration could not be held liable for tortious interference, because they could not make the ultimate decision to grant or deny plaintiff's staff privileges. *Id.* at 1028. The court

reasoned that this decision could only be made by the hospital itself acting through a composite of those defendants acting in their official capacities. *Id.* There is nothing of record which would allow a reasonable inference of interference by these defendants.

E. Generally. Finally, I discuss two factual issues which apply generally to all defendants: whether the defendants had the opportunity to conspire, and whether the defendants had a rational economic incentive to deal with plaintiff in the absence of a conspiracy.

The first issue is straightforward. The record indicates numerous connections between the defendants which support an opportunity to conspire. All of the physicians who were members of the Board of Health First were doctors practicing regularly at either Baptist or Sacred Heart. Sacred Heart officials met frequently with Baptist officials. Dr. Shearlock, President of Health First, was on the Baptist Executive Committee which first considered plaintiff's application in 1985. Dr. Baroco, President of HOP, attended the Sacred Heart Executive Committee meeting at which plaintiff's privileges request was turned down. Dr. Whibbs, a Health First Board member, served on the Sacred Heart Credentials Committee which denied plaintiff's application. Finally, Sacred Heart Administrator Hardman's appointment records show that he met frequently with a Pensacola Pathologist representative during the period prior to Michael Williamson's termination. Although evidence of an opportunity to conspire is not a prerequisite to withstand summary judgment on the Sherman Act claims, I find sufficient evidence in the record to create a genuine factual issue.

I also conclude that a genuine issue exists with respect to the existence of economic incentives for defendants to deal with plaintiff in the absence of a conspiracy. A reasonable factfinder could conclude that the hospitals had an economic incentive to admit plaintiff. In the absence of concerns regarding competency, or other valid administrative concerns, a hospital gains by the admission of physicians, in that their patients will be more likely to use its services and facilities, and it will have the benefit of their practice. Plaintiff submits physician testimony indicating that for these reasons, the hospitals rarely denied privileges. Defendants submit evidence to the contrary, leaving the matter at issue.

The same is true of Health First. Plaintiff cites internal documents of HOP and Health First indicating that both were very concerned about the high cost of radiological services. Plaintiff cites evidence from her own office indicating that her fees were lower than the fees of Health First's member radiologists. Thus, plaintiff argues, Health First had every incentive to accommodate her request for membership. But there is also evidence to the contrary.

As a general matter, summary judgment is not appropriate in fact-intensive antitrust cases. That general rule is again illustrated by this case. The sheer volume of relevant evidence submitted by the plaintiff is enough to create genuine issues of fact as to the necessary elements of her claims. Defendants have submitted equally voluminous and probative evidence on these issues. The sifting and weighing of all of this evidence must be left to the jury. Therefore, the motions are DENIED as to all remaining defendants on the antitrust claims.

IV. THE TORTIOUS INTERFERENCE CLAIMS.

Defendants also seek summary judgment on the pendent tortious interference claims. In Count IV, plaintiff alleges that defendants Sacred Heart, PRC, and Post intentionally and wrongfully interfered with existing and prospective business relationships which plaintiff had with patients at her clinic and with other doctors, and that they further interfered with prospective relationships plaintiff had with HOP patients.[20]

Tortious interference with business relationships and tortious interference with contractual relations are "basically the same cause of action" under Florida law. *Smith v. Ocean State Bank*, 335 So.2d 641, 642 (Fla. 1st DCA 1976). "The only material difference appears to be that in one there is a contract and in the other there is only a business relationship." *Id.* In order to prove a tortious interference claim, the plaintiff must demonstrate (1) the existence of a business (or contractual) relationship under which the plaintiff had legal rights; (2) an intentional and unjustified interference with the relationship; and (3) damage to the plaintiff as a result of the tortious interference with that relationship. *Ad-Vantage Telephone Directory Consultants, Inc. v. GTE Directories*, 849 F.2d 1336, 1348-1349 (11th Cir. 1987) (applying Florida law); *Tamiami Trail Tours, Inc. v. Cotton*, 463 So.2d 1126, 1127 (Fla. 1985). The relationship involved can be based on a business expectancy arising "even from an unenforceable agreement which would

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[20] I have already concluded that summary judgment must be granted to defendants PRC and Post on this claim because of the absence of any causation. This discussion applies to defendant Sacred Heart.

have been completed had the defendant not intervened." *Scussel v. Balter*, 386 So.2d 1227, 1228 (Fla. 3d DCA 1980), *citing United Yacht Brokers, Inc. v. Gillespie*, 377 So.2d 668 (Fla. 1979).

1. Whether the Interference Was Sufficiently Direct. In Florida, conduct that has only indirect consequences on a plaintiff will not support a claim for tortious interference. *See Lawler v. Eugene Wuesthoff Mem. Hospital Assoc.*, 497 So.2d 1261, 1263 (Fla. 5th DCA 1986); *Rosa v. Florida Coast Bank*, 484 So.2d 57 (Fla. 4th DCA 1986). Sacred Heart argues that the record does not support the existence of any direct interference by it with plaintiff's relationship with her patients or other doctors.

Plaintiff cites authority suggesting that the requirement of "directness" simply refers to whether the interference was intentional. I disagree. Many of the Florida cases upholding tortious interference liability emphasize a direct contact between the defendant and plaintiff's customers. *See, e.g., Ad-Vantage Telephone Directory Consultants, Inc. v. GTE Directories*, 849 F.2d 1336, 1348-1349 (11th Cir. 1987) (defendant contacted customers of plaintiff, improperly imposing additional burdens on them if they continued to deal with plaintiff); *Manuf. Research Corp. v. Greenlee Tool Co.*, 693 F.2d 1037 (11th Cir. 1982) (defendant contacted customers and employees of plaintiff with false information, which constituted direct interference); *Ins. Field Servs., Inc. v. White & White Inspection & Audit Serv., Inc.*, 384 So.2d 303 (Fla. 5th DCA 1980) (direct tortious interference found where defendants contacted plaintiff's customers to solicit their business in a wrongful manner).

Defendant Sacred Heart cites *Lawler, supra*, where the Fifth District Court of Appeal held that although a hospital's wrongful termination with plaintiff's staff privileges may have constituted interference with his doctor-patient, doctor-doctor relationships, this interference "was only an indirect consequence of the termination of [plaintiff's] staff privileges." *Lawler*, 497 So.2d at 1263. The court in *Lake Hospital & Clinic, Inc. v. Silversmith*, 551 So.2d 538, 544 (4th DCA 1989), agreed. In that case, the court emphasized that a tortious interference plaintiff must show that the defendant actually interfered with a particular doctor-doctor or doctor-patient relationship. *Silversmith*, 551 So.2d at 544. Thus, it was not sufficient to show that there was an interference with such relationships as an indirect consequence of the termination of plaintiff's staff privileges. *Id.*

Florida authority is not uniform on this point, however. Plaintiff points to *Scheller v. Am. Medical Int'l, Inc.*, 502 So.2d 1268 (Fla. 4th DCA 1987), *cert. denied*, 513 So.2d 1060 (1987),[21] where the Fourth District Court of Appeal (the same court that decided *Silversmith*) dealt with a doctor's claim that a hospital had prevented him from providing effective service to patients and other doctors by, *inter alia*, wrongfully denying him access to laboratories and billing information. The court

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[21] Defendants also cite *Am. Med. Int'l, Inc. v. Scheiler*, 462 So.2d 1 (Fla. 4th DCA 1984), *review denied*, 471 So.2d 44 (1985), an earlier stage in the proceedings of this case. This opinion is less helpful, because the analogous tortious interference claim was rejected on the distinct ground that the defendants' interference was "unsuccessful," i.e., plaintiff suffered no injury to his doctor-doctor or doctor-patient relationships.

held that plaintiff stated a valid tortious interference cause of action. *Id.* at 1271-1272.

Although Florida law on this question is not entirely clear, defendants' position seems to have the greater merit, based on the number of Florida cases in other contexts requiring some sort of direct interference by the defendant. However, summary judgment on the tortious interference claims against Sacred Heart is still not appropriate. Plaintiff also alleges interference of a direct manner: the use of economic pressure to divert referrals from plaintiff to Sacred Heart, and to coerce Pensacola Pathologists into terminating plaintiff's husband. This type of conduct clearly constitutes interference of a sufficiently direct nature to withstand summary judgment.

2. Whether Any Interference Was Justified As the Protection of Defendant's Economic Interests. In Florida, no tortious interference liability may exist where the defendant acted to protect its own legitimate economic interests. In *Genet Co. v. Anheuser-Busch Inc.*, 498 So.2d 683, 684 (Fla. 3d DCA 1986), for example, the defendant had a contractual right to disapprove the attempt by one of its wholesalers to sell a wholesalership to the plaintiff. The court, finding the defendant's disapproval of the sale to be an act to safeguard its own economic and financial interests, found that disapproval non-actionable. *Id.*

Similarly, in *Ethyl Corp. v. Balter*, 386 So.2d 1220, 1224 (Fla. 3d DCA 1980), *review denied*, 392 So.2d 1271 (Fla.), *cert. denied*, 452 U.S. 955, 101 S.Ct. 3099, 69 L.Ed.2d 965 (1981), the defendant solicited competing and superior offers to fund the reorganization of the plaintiff business, forcing the plaintiff to sweeten its own deal to the point where

its second collapse was inevitable. But the defendant, who had gained control of plaintiff's stock after it had bankrolled plaintiff's first unsuccessful attempt to stay afloat, had a vested interest in a successful reorganization: without that successful reorganization, it could not recover the money it had lent the plaintiff. The court therefore held that the defendant's actions fell under the general rule that "so long as improper means are not employed, activities taken to safeguard or promote one's own financial, [sic] and contractual interests are entirely non-actionable." *Ethyl*, 386 So.2d at 1224-1225 (emphasis added) (citing cases).

Even when acting in its own legitimate interests, a tortious interference defendant may not use "improper means." *See G.M. Brod & Co., Inc. v. U.S. Home Corp*, 759 F.2d 1526, 1535 (11th Cir. 1985) (Florida law) ; *Ahern v. Boeing Co.*, 701 F.2d 142 (11th Cir. 1983) (same).

In *Genet*, Anheuser-Busch merely exercised its contractual right to withhold approval of the sale of a wholesalership to plaintiff, protecting its interests as a manufacturer with a standing business relationship with its wholesalers. In *Ethyl*, the defendant solicited competing bids for reorganization, protecting its interest in recovering the bad loans. Neither of these methods were improper.

Ad-Vantage, *supra*, provides a useful contrast. In that case, the plaintiff was an independent advertising consultant and "selling representative," contracting with individual clients to obtain advertising space in the yellow pages published by the defendant. Plaintiff discounted the advertising rates for its clients while still paying defendant the normal rates, taking the difference out of its own commissions. When plaintiff fell

behind on the payments owed defendant, the defendant wrote directly to plaintiff's clients, explaining that (1) certain difficulties had arisen between the two; (2) that defendant would henceforth bill each advertiser directly; and (3) that future advertising orders submitted by plaintiff must be accompanied by advance payment or a guarantee of payment by the advertiser. *Id.* at 1340.

The Eleventh Circuit upheld the district court's denial of a directed verdict motion, holding that even if the defendant had a legitimate interest in collecting from the plaintiff, the jury was entitled to find that the methods used by the defendant were wrongful. *Id.* at 1349. The court concluded that there was evidence sufficient for the jury to find that the defendant's "end run" around the plaintiff was not the least damaging means of ensuring payment. The court stated that the jury could find (1) that the defendant had no contractual right to deal directly with the plaintiff's customers; (2) that such direct dealing was not the usual practice within the industry; and (3) that the defendant chose a "particularly devastating way to obtain its money ... a way calculated to damage Ad-Vantage's business relationships." *Ad-Vantage*, 849 F.2d at 1349.

In this case, a reasonable factfinder could find that defendant Sacred Heart deliberately exerted economic pressure upon other doctors to divert referrals from plaintiff and to terminate plaintiff's husband, all for the purpose of destroying or limiting plaintiff's competing practice. Regardless of the extent to which any opposition to plaintiff's privileges, use of the needle placement procedure, etc., were legitimate concerns in protection of defendants' own economic interest, a jury could reasonably determine these methods to be improper. Summary judgment is inappropriate on this ground as well.

V. CONCLUSION.

For the reasons set out above, summary judgment is GRANTED as to defendants PRC and Post as to Counts I, III, and IV. As to all other defendants and counts, the motions for summary judgment are DENIED.

DONE AND ORDERED this 27th day of December, 1991.

ROGER VINSON
United States District Judge